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NO. 84-5555

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1984

LARRY GENE HEATH,

Petitioner

v.

STATE OF ALABAMA

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does this Court have jurisdiction to review a question which was not presented in or decided by the court below? Is any substantial federal question of Alabama's jurisdiction over the Petitioner's crime presented where a major portion of the crime, including the Petitioner's main acts in furtherance of the crime, took place in Alabama?

2. Should this Court grant certiorari as to the issue of whether the Petitioner's conviction in Alabama was barred by Double Jeopardy where the Court has repeatedly held for over 130 years that prosecution by separate sovereigns, such as Alabama and Georgia, does not constitute Double Jeopardy?

3. Does this Court have jurisdiction to decide a question which was not raised or considered in the court below? Is any substantial federal question raised as to whether Alabama acted ar a tool for Georgia in prosecuting the Petitioner where no facts presented suggested such a relationship?

4. Does this Court have jurisdiction to decide a question which was not raised or considered in the court below? Should this Court grant certiorari as to the issue of whether the Petitioner's death sentence violated Double Jeopardy where the Court has held for over 130 years that Double Jeopardy does not apply to prosecution by separate sovereigns such as Alabama and Georgia?

PARTIES

The caption contains the names of all parties in the courts below.

OPINIONS BELOW

The opinions of the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirming the Petitioner's conviction and sentence are attached as Appendix A & B.

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JURISDICTION

The decision of the Alabama Supreme Court from which the Petitioner's seeks relief was entered on July 6, 1984. This Court has jurisdiction pursuant to 28 U.S.C. Section 1257 as to the issue addressed under Argument II of this brief. This Court has no jurisdiction as to the other three issues raised by the Petitioner, addressed in this brief under Arguments I, III, and IV, because these issues were not presented to or passed upon by the court below.

CONSTITUTIONAL PROVISIONS INVOLVED

The petition addresses issues under the Fifth and Fourteenth Amendments to the United States Constitution.

STATUTORY PROVISIONS INVOLVED

The petition addresses issues involving Code of Alabama 1975, Section 13A-5-40(a)(1) and Section 15-2-3, which are set out below.

> Section 13A-5-40(a)(1) reads as follows:
>
> (1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant.
>
> Section 15-2-3 reads as follows:
>
> When the commission of an offense commenced in the State of Alabama is consummated without the boundaries of the state, the offender is liable to punishment therefor in Alabama; and venue in such case is in the county in which the offense was commenced, unless otherwise provided by law.

STATEMENT OF THE CASE

(A) STATEMENT OF THE FACTS

Sometime during the late summer of 1981 the Petitioner, a resident of Russell County, Alabama,[1] decided to have his then pregnant wife Rebecca Heath, killed. After having approached several persons about doing the killing, the Petitioner reached an agreement with one Slim Owens that Owens and another man would do the job for two thousand dollars ($2,000.00).

Owens and the other man were to abduct Mrs. Heath using her own car; at an appointed spot a brick was to be placed on the accelerator of Mrs. Heath's car and a section of wire was to be used to secure the car's steering wheel, and the car was to be run into a creek at high speed with Mrs. Heath inside to make it appear as though her death was an accident. On the morning of August 31, 1981, the day chosen for the abduction and killing, the Petitioner, having placed the brick and the wire inside his wife's car, met Owen and his partner and lead them to his house in Russell County, Alabama. The Petitioner then told the two hired killers that they would have to enter his house and abduct his wife from it; he had previously left the door of his house unlocked for this purpose. Later that day the body of nine month pregnant Rebecca Heath was found on the side of the road in nearby Troup County, Georgia; she had been shot through the right eye.

(B) PROCEEDINGS BELOW

On February 10, 1982, the Petitioner pleaded guilty in the Superior Court of Troup County, Georgia, to the murder

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[1]Russell County is located across the Chattahoochee River from the State of Georgia.

of Rebecca Heath. On May 5, 1982, the Petitioner was indicted by the Grand Jury of Russell County, Alabama, for the murder during a kidnapping in the first degree of Rebecca Heath in violation of Code of Alabama 1975, Section 13A-5-40(a)(1). On October 20, 1982, the Petitioner was arraigned and entered a plea of not guilty. On November 2, 1982, the Petitioner entered a plea of autrefois convict and a plea of former jeopardy; on December 10, 1982, the pleas of autrefois convict and former jeopardy were denied. Trial commenced on January 10, 1983; after hearing the evidence the jury found the Petitioner guilty as charged on the indictment. At a later sentence hearing the jury considered evidence of aggravating and mitigating circumstances, and recommended the punishment of death. The trial court, after weighing the aggravating and mitigating circumstances, followed the jury's recommendation and sentenced the Petitioner to death.

On July 5, 1983, the Alabama Court of Criminal Appeals affirmed the Petitioner's conviction and sentence, and on August 2, 1983, that Court overruled his application for rehearing. On July 6, 1984, the Alabama Supreme Court also affirmed the Petitioner's conviction and sentence.

SUMMARY OF ARGUMENT

The Court should not grant certiorari as to the question of whether Alabama properly had jurisdiction over the Petitioner's crime because: (a) the issue was not presented or decided below and therefore the Court has no jurisdiction to decide the issue; (b) Alabama properly exercised jurisdiction over the crime because a major portion of the kidnapping/murder occurred in Alabama; and (c) Alabama properly exercised jurisdiction over the Petitioner's crime because the Petitioner's own inculpatory acts in furtherance

of the kidnapping/murder occurred in Alabama.

The Court should not grant certiorari as to the issue of whether the Petitioner's conviction in Alabama after his conviction in Georgia violated the Double Jeopardy Clause because for over 130 years this Court has held that prosecution by separate sovereigns such as Alabama and Georgia does not involve Double Jeopardy.

The Court should not grant certiorari as to the issue of whether Alabama acted as a tool of Georgia in prosecuting the Petitioner in Alabama because: (a) the issue was not presented or decided below and therefore this Court has no jurisdiction to decide it, and (b) no facts presented suggest any such relationship between Alabama and Georgia law enforcement officials.

The Court should not grant certiorari as to the issue of whether the Petitioner's death sentence in Alabama was barred on Double Jeopardy grounds by his prior life sentence in Georgia because: (a) the issue was not raised or decided below and thus this Court does not have jurisdiction to decide the issue, and (b) this Court has held for over 130 years that Double Jeopardy does not apply to prosecution by separate sovereigns such as Alabama and Georgia.

ARGUMENT

I. THIS COURT HAS NO JURISDICTION TO CONSIDER A QUESTION NOT PRESENTED TO OR DECIDED BY THE COURTS BELOW. THE PETITIONER'S CLAIM THAT ALABAMA HAS NO JURISDICTION OVER HIS CRIME PRESENTS NO SUBSTANTIAL FEDERAL QUESTION BECAUSE A MAJOR PORTION OF THE CRIME, INCLUDING THE PETITIONER'S MAIN ACTS IN FURTHERANCE OF IT, TOOK PLACE IN ALABAMA.

On page 4 through 8 of his petition for writ of certiorari the Petitioner makes a mottled argument as to the alleged illegality of his prosecution in Alabama. At first the Petitioner claims that his Fifth Amendment right against

Double Jeopardy was violated in that he was tried and convicted for an offense for which he had already been convicted in Georgia. The Petitioner next argues that Alabama had no jurisdiction at all over the offense, presumably regardless of Georgia's actions, because the offense occurred in Georgia, not Alabama. The first of these subarguments is addressed below under Argument II. The second is addressed immediately below.

This Court should not grant certiorari as to the issue of whether Alabama had jurisdiction of the offense of which the Petitioner was convicted, for three separate reasons. First, the issue was not addressed by the Alabama Supreme Court or by the Alabama Court of Criminal Appeals (see attached Appendices A and B). Where the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary. Street v. New York, 394 U.S. 576, 582 (1969). The Petitioner claims at page 2 of his petition that the issue was raised below; however, it was not (see Appendices C, D, and E, copies of the Petitioner's brief to the Alabama Court of Criminal Appeals, his brief in support of rehearing in that court, and his brief in support of petition for writ of certiorari to the Alabama Supreme Court). An issue raised for the first time in this Court need not be decided by this Court, Moore v. Illinois, 408 U.S. 786, 799 (1972); moreover, this Court has no jurisdiction to decide such an issue. Street v. New York, at 581 & 582; Bailey v. Anderson, 326 U.S. 203, 206 & 207 (1945).

The second reason this Court should not grant certiorari as to the jurisdiction issue is that, contrary to the Petitioner's assertion, the offense did not occur solely in

Georgia. The Petitioner was convicted as an accomplice to a kidnapping/murder, which is defined under Code of Alabama 1975, Section 13A-5-40(a)(1) as follows:

> (1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant.

Under Alabama law capital offenses such as kidnapping/murder and robbery/murder consist of two element but not two different offenses. Ex parte Baldwin, 372 So. 2d 32 (Ala. 1979). The states generally have the authority to define their own crimes. United States v. Wheeler, 435 U.S. 313, 320 (1978); Rochin v. California, 342 U.S. 165, 168 (1952). Criminal liability in Alabama for a single offense commenced in Alabama and consummated outside of the state is provided in Code of Alabama 1975, Section 15-2-3, which reads as follows:

> When the commission of an offense commenced in the State of Alabama is consummated without the boundaries of the state, the offender is liable to punishment therefor in Alabama; and venue in such case is in the county in which the offense was commenced, unless otherwise provided by law.

Section 15-2-3 is consistent with the general American rule regarding offenses the elements of which occur in different states. 22 C.J.S., Criminal Law §§115, 133(b)(1961); 21 Am. Jur.2d, Criminal Law, Section 345 (1981). Thus, contrary to the Petitioner's argument, there was no extraterritorial exercise of jurisdiction.

The third reason this Court should not grant certiorari as to the jurisdiction issue is that the Petitioner's own inculpatory acts were intimately connected with the State of Alabama. In his confession the Petitioner admitted that prior to the time of the offense he had placed a brick and some blue wire, both of which were to be used by the hired killers

in an attempt to make his wife's killing appear to be an accident, in the back floorboard of his wife's car which was parked at the Petitioner's home in Alabama (R. 544-546). The Defendant also admitted that on the morning of the crime he met the killers and lead them by car to his home in Alabama (R. 545 & 546), pointing out his house and telling them that they would have to go into the house and get his wife (R. 469 & 470). Thus not only did at least one-half of the crime, the kidnapping element, occur in Alabama, but also the Petitioner's primary inculpatory acts took place there. For this reason it is surely ironic that the Petitioner now claims that Alabama's assumption of jurisdiction over his criminal acts is improper.

On page 4 of his petition the Petitioner calls the Court's attention to its recent grant of certiorari in Fugate v. New Mexico, No. 83-6663 (October 1, 1984), suggesting that the issue in the case at bar regarding jurisdiction is related to the issue in Fugate. This is not the case. In the Fugate decision below, the New Mexico Supreme Court adhered to its earlier decisions that a defendant convicted of a lesser offense can later be prosecuted for a greater offense arising out of the same facts in a court in the same state where the first court did not have subject matter jurisdiction of the greater offense. State v. Fugate, 678 P. 2d 686 (N.M. 1984). Fugate is entirely distinct from the question raised by the Petitioner, concerning the extraterritorial limits of a state's criminal jurisdiction.

For the above reasons the Court should not grant certiorari as to this issue.

II. THIS COURT SHOULD NOT GRANT CERTIORARI AS TO THE ISSUE OF WHETHER THE PETITIONER'S CONVICTION IN ALABAMA WAS BARRED BY DOUBLE JEOPARDY BECAUSE THE COURT HAS REPEATEDLY HELD FOR OVER 130 YEARS THAT PROSECUTION BY SEPARATE SOVEREIGNS, SUCH AS ALABAMA AND GEORGIA, DOES NOT CONSTITUTE DOUBLE JEOPARDY.

As a part of Argument I, on pages 4 and 5, and in Argument II, on pages 8 through 11, the Petitioner argues that his conviction for kidnapping/murder in Alabama after his conviction in Georgia for murder violates his Fifth Amendment protection against Double Jeopardy. This Honorable Court should not grant certiorari as to this issue because the position taken by the Petitioner is contrary to the holdings of this Court for the last 132 years.

The Double Jeopardy clause of the Fifth Amendment provides as follows:

> ...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...
>
> (emphasis added)

In Moore v. Illinois, 55 U.S. 13 (1852), the Court held that an act may constitute two different offenses where it violates the law of two different sovereigns.

> Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both...That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable.
>
> 55 U.S. at 20
> (emphasis added)

Thus developed the "dual sovereignty" doctrine, under which a person may be convicted in state court and subsequently tried for the same act in federal court, or vice versa, without violation of the constitutional protection against Double

Jeopardy. Abbate v. United States, 359 U.S. 187 (1959). This doctrine has continued to be applied by this Court in cases of alleged double jeopardy violations from multiple prosecutions; the questions concerning the application of the dual sovereignty doctrine have centered around whether the two governmental entities derived their power to prosecute from the same source. United States v. Wheeler, 435 U.S. 313 (1978)(Indian tribal law and Federal criminal law have sources independent of each other); Waller v. Florida, 397 U.S. 387 (1970)(a state and a municipality within that state are not separate entities because municipalities are creations of states).[2]

It appears that the situation of multiple state prosecutions has not been addressed by this Court. The application of the dual sovereignty doctrine to the present situation, however, is entirely proper. In United States v. Wheeler, supra, this court stated that the test for the existence of dual sovereignty was whether the ultimate source of the power under which the respective prosecutions were

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[2]The Petitioner states in footnote on page 9 of his petition that in four cases this Court has cast doubt on the continuing validity of the dual sovereignty doctrine. The Respondent would disagree. In Benson v. Maryland, 395 U.S 784 (1969), the Court applied the Fifth Amendment's Double Jeopardy provision to the states, and bars one state's multiple prosecution of a defendant. In Ashe v. Swenson, 397 U.S 436 (1970), the Court utilized the protection against Double Jeopardy to prohibit one state's prosecution for two crimes where they both involved a common factual question which was decided favorably to the defendant in the first trial. In Murphy v. Waterfront Commission of New York, 378 U.S. 52 (1964), the Court held that self-incriminatory testimony obtained upon a grant of immunity by one jurisdiction cannot be used in a prosecution by another jurisdiction; the Court, however, did not hint that the prosecution by the second jurisdiction should be barred altogether. In Elkins v. United States, 364 U.S 206 (1960), the Court held that the fruits of an illegal search conducted by state officials could not be used in a federal trial; the Court did not bar the federal trial altogether.

undertaken was the same. 435 U.S. at 320. In Wheeler the court recognized that both a state and the federal government have the power, inherent in sovereigns, independently to determine what shall be an offense against their respective authorities and to punish such offenses, and in doing so they each exercise their own authorities, not that of each other. Id. Because each state is a separate sovereign vis a vis the federal government, each state must be considered a separate authority vis a vis other states.

The Petitioner asks this Court to grant certiorari based upon Brown v. Ohio, 432 U.S. 161 (1977). In Brown, two Ohio municipalities sought to prosecute a defendant based upon the same series of acts. The Court explicitly recognized that, because under Waller v. Florida, supra, the two municipalities must be considered to have derived their authority from the State of Ohio, the dual sovereignty doctrine had no application. 432 U.S. at 164 n. 4. Thus Brown is not relevant to the state/state situation.

As has been shown above, the prior decisions of this Court regarding the dual sovereignty doctrine clearly preclude the question now presented by the Petitioner. For this reason the Court should not waste its limited certiorari resources on the issue, and should deny certiorari as to this issue.

III. THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE A QUESTION WHICH WAS NOT RAISED OR CONSIDERED IN THE COURT BELOW. NO SUBSTANTIAL FEDERAL QUESTION IS RAISED AS TO WHETHER ALABAMA ACTED AS A TOOL FOR GEORGIA IN PROSECUTING THE PETITIONER BECAUSE NO FACTS SUGGEST SUCH A RELATIONSHIP.

On pages 12 and 13 of his petition the Petitioner argues that the dual sovereignty doctrine should not apply to this case because of the cooperation between law enforcement officials in Alabama and Georgia. This Court should not

grant certiorari as to this issue for two reasons. First, as was the case with the issue treated above under Argument I, the issue of whether the dual sovereignty doctrine should not be applied because of close cooperation in the investigation between officials of the two sovereigns was not decided below (see Appendices A and B). Where the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary. Street v. New York, 394 U.S. 576, 582 (1969). The Petitioner claims at page 2 of his petition that the issue was raised below; however, it was not (see Appendices C, D, and E, copies of the Petitioner's brief to the Alabama Court of Criminal Appeals, his brief in support of rehearing in that Court, and his brief in support of petition for writ of certiorari to the Alabama Supreme Court). An issued raised for the first time in this Court need not be decided by this Court, Moore v. Illinois, 408 U.S. 786, 799 (1972); moreover, this Court has no jurisdiction to decide such an issue. Street v. New York, at 581 & 582; Bailey v. Anderson, 326 U.S. 203, 206 & 207 (1945).

The second reason this Court should not grant certiorari as to this issue is that the cooperation here falls far short of that required for the abandonment of the dual sovereignty doctrine. In Bartkus v. Illinois, 359 U.S 121, 122-124 (1959), this Court suggested that the dual sovereignty doctrine would not apply where one governmental entity was simply acting as a tool for another governmental entity in the prosecution. In Bartkus, however, the Court readily applied to dual sovereignty doctrine where there had only been cooperation between law enforcement agencies in the investigation. Bartkus v. Illinois, supra. In the case at

bar there was testimony of the cooperation of Alabama and Georgia law enforcement officials in the investigation of the crime, the kind of cooperation that was helpful and even necessary in the investigation of a crime that crossed state borders. There was no testimony, however, that suggested that the State of Alabama became a tool of the State of Georgia in the Alabama prosecution, or vice versa. Nor was there any reason for Georgia to be interested in prosecuting the Petitioner by way of Alabama's criminal law; the Petitioner had already pleaded guilty in Georgia and had been sentenced to a term of life in prisonment.[3] Even in brief the Petitioner makes no claim that Alabama served as Georgia's tool. Thus the Petitioner's claim that the dual sovereignty doctrine should not be applied because of law enforcement cooperation is simply insubstantial.

For the above reasons the Court should deny certiorari as to this issue.

IV. THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE A QUESTION WHICH WAS NOT RAISED OR CONSIDERED IN THE COURTS BELOW. THIS COURT SHOULD NOT GRANT CERTIORARI AS TO THE ISSUE OF WHETHER THE PETITIONER'S DEATH SENTENCE VIOLATED DOUBLE JEOPARDY WHERE THE COURT HAS HELD FOR OVER 130 YEARS THAT DOUBLE JEOPARDY DOES NOT APPLY TO PROSECUTION BY SEPARATE SOVEREIGNS SUCH AS ALABAMA AND GEORGIA.

On pages 13 and 14 of his petition the Petitioner asserts that Bullington v. Missouri, 451 U.S. 430 (1981), and Arizona v. Rumsey, _____ U.S. _____, 81 L. Ed 2d 164 (1984), bar his Alabama death sentence after he was given a sentence of life in Georgia. There are two reasons this Court should not grant certiorari as to this issue.

First, Bullington and Rumsey were both based upon the

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[3]By contrast, in Bartkus the defendant was acquited in federal court before the State of Illinois even indicted him.

principle of Double Jeopardy. As has been argued above under Argument II, this Court has consistently ruled that the constitutional prohibition against Double Jeopardy does not apply to prosecutions by two independent sovereigns, as is the case here.

Second, this issue, like the issues addressed under Arguments I and III, was not presented to or decided by the courts below (see Appendices A, B, C, D and E). Based upon the cases cited under Arguments I and III this Court should not grant certiorari on an issue not presented or passed on below.

For the above reasons the Court should not grant certiorari as to this issue.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William D. Little, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this 9th day of November, 1984, I did serve upon the Honorable Ronald J. Allen, Counsel for Petitioner, Northwestern University School of Law, 357 E. Chicago Avenue, Chicago, Illinois 60611, a copy of the aforegoing, by placing said copy in the United States Mail, first class postage prepaid.

William D. Little

WILLIAM D. LITTLE
ATTORNEY FOR RESPONDENT

APPENDIX

Supreme Court of the United States

No. 84-5555

Larry Gene Heath,

Petitioner,

v.

Alabama

On Petition for Writ of Certiorari to the Supreme Court of the State of Alabama.

On Consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question II.

In addition, the parties are requested to address the following question:

'What is the applicability, if any, of the dual sovereignty doctrine to successive prosecution by two different states?'

Justice Powell took no part in the consideration or decision of this motion and this petition.

March 4, 1985